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In the Supreme Court of the United States

October Term, 1970

No. 747

E. E. MARSHALL, Administrator of the Estate of MATHEW A. MARSHALL, deceased,
Petitioner,

vs.

HOLLYWOOD, INC., et al.,
Respondents.

ON PETITION FOR CERTIORARI

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA BY RESPONDENTS JOSEPH DIBARI; J. PETRUSELLI and VERA PETRUSELLI, his wife; G. DeCHIARO and MARY DeCHIARO, his wife; MILDRED GARBER and H. N. GARBER; LESTER LEHN; SIMON GARSINA and AMELIA GARSINA; RAYMOND MOHR and ALBERTA MOHR; RALPH E. LUEBBERS and VIOLA L. LUEBBERS; ROBERT G. SABELLA and LORRAINE T. SABELLA.

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PREFACE

The following abbreviations will be usd in this Brief:

1. P. B. — Page references to Petitioner's Brief
2. P. App. — Page references to Petitioner's Appendix to his Brief
3. The Florida Court — Supreme Court of Florida
4. The District Court — Fourth District Court of Appeal of the State of Florida
5. F. S. A. — Florida Statutes Annotated
6. The Act — Florida's Marketable Record Title Act (Chapter 712, F. S. A.)

QUESTIONS PRESENTED

Petitioner seeks determination of whether he has been denied due process and the equal protection of the law under the Fourteenth Amendment to the Constitution when, in a case of first impression, the Florida Court affirmed the ruling of the District Court that the rights of an owner of land were extinguished when said owner's name was forged to a deed which formed one of the links in a chain of title prior to the chain's determinative "root of title" by the operation of Florida's Marketable Record Title Act (Chapter 712, F. S. A.)—where such owner failed to bring himself within any of the stated exceptions to said Act.

In turn, your Respondents question whether any constitutional question exists as well as whether same was timely raised by the Petitioner.

STATEMENT OF THE CASE

While the facts of this case are stated fully in the decisions of both the District Court (224 So.2d 743, P. App. 33) and of the Florida Court (236 So.2d 114, P. App. 1), the Petitioner in his statement of the case contends that the District Court's holding was that Florida's Marketable Record Title Act *"conferred marketability on a chain of title BEGINNING with a forged deed"* (P. B. 4). Respondents disagree with this statement and assert that the District Court's decision (P. App. 33) contains no such holding. Respondents' chain of title *begins* not with the allegedly forged deed from ATLANTIC BEACH COMPANY to FRANK M. TERRY which was recorded on 2 February 1924. Rather, our chain *begins*, as with most Florida land, with the Treaty between Spain and the United States whereunder Spain "ceded" the Floridas to the United States. The District Court's opinion clearly discloses that the 2 February 1924 recorded deed to TERRY was not the "root of title" under Florida's Marketable Record Title Act.

The District Court held that this TERRY deed was nothing more than an instrument purporting to create an estate which appeared in the chain of title before the determinative "root of title" (just as the aforementioned Treaty with Spain precedes the operative roots of title in the subject land's chain).

What the District Court held was that

1. since Petitioner's Second Amended Complaint revealed title transactions recorded after the TERRY deed, including one on 22 August 1924

(deed from Hollywood Realty Company to Homeseekers Realty Company) and one on 21 February 1931 (deed from the Highway Construction Company of Ohio, Inc., to Hollywood, Inc.);

2. which title transactions had been of record for more than thirty (30) years when Petitioner filed his original Complaint on 13 July 1967—such allegations of the Petitioner's Second Amended Complaint disclosed the existence of determinative *"roots of title" which postdated the claimed forged TERRY deed* in the Respondents' chain; and, further,

3. since the Petitioner had alleged the Respondents all claimed an interest in the subject land as either the grantee or the successors in title of the grantee of these title transactions, the Petitioner had effectively PLEAD HIMSELF OUT OF COURT

4. where Petitioner failed to allege he fell under any of the exceptions to Florida's Marketable Record Title Act (Chapter 712, F. S. A.);

5. because the effect of the Act is to *extinguish all claims whatsoever which depend upon any Act that occurred prior to the effective date of such roots of title* (Section 712.04, F. S. A.—P. App. 28).

Thus, the holding of the District Court was that Florida's Marketable Record Title Act extinguished the rights of owners whose names were forged to a link in the chain of title prior to its "root of title" (as same is defined by the Act—see Sec. 712.01, F. S. A., P. App. 25).

This is the holding which the Supreme Court of Florida affirmed.

Petitioner admits he first raised the constitutional question on his Petition for Rehearing from the decision of the Florida Court. While Respondents agree as to the *stage of the proceedings* where Petitioner attempted to raise the constitutional question, the Respondents totally disagree that such question exists, much less that such question was timely raised by the Petitioner.

ARGUMENT

PART I — NO CONSTITUTIONAL QUESTION EXISTS

Florida's Marketable Record Title Act provides that ANYONE (not just Petitioner) who has ANY interest or claim in land arising out of ANY act, event or omission that occurred prior to the effective date of the land's "root of title" (which the Act defines as *ANY transaction purporting to create or transfer the estate claimed* which has been recorded at least thirty (30) years prior to the time when marketability is being determined—Section 712.01 (2), F. S. A., P. App. 25) shall have his interest or claim extinguished (Section 712.04, F. S. A., P. App. 28) unless such person files for recording a Notice of his interest or claim within said thirty-year period (Section 712.05, F.S.A., P. App. 28). Such notice is to be recorded in the County where the land described is located (Section 712.05, F.S.A., P. App. 29) and if so filed, the person filing same shall have his interest or claim preserved for up to thirty years (Section 712.03(2), F.S.A., P. App. 27). Such person or his heirs or assigns can thereafter continue to preserve such claim ad infinitum by the filing of successive notices of claim (Section 712.05(1), F. S. A., P. App. 28) until

someone obtains a judicial determination of the efficacy of such claim or interest from an appropriate tribunal.

Although the Florida Court followed the wording of the statute, and thus treated Petitioner and his circumstances as "anyone" within the meaning of the statute, the Petitioner claims a denial of his constitutional right to the equal protection of the laws.

Florida construes the "equal protection" clause of the Fourteenth Amendment to the Federal Constitution to mean that the rights of all persons must rest upon the same rule under similar circumstances (*State Ex Rel Vars* v. *Knott* (1938), 135 Fla. 206; 184 So. 752, 754. SEE ALSO *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459; 57 S.Ct. 838; 81 L.Ed. 1223.

Nowhere in his brief does Petitioner demonstrate that Florida's Marketable Record Title Act was construed under a different rule for the Petitioner than for anyone else under the same circumstances; namely, anyone's interest or claim would have been extinguished in the absence of their filing a Notice of Claim where such interest or claim depended upon an act or omission that occurred *prior* to a transaction which "purports to transfer" the estate claimed when said transaction has appeared on the public records for at least thirty years prior to the determination of marketability.

It is difficult to understand how a state court can be charged with a denial of equal protection of the law when, as here, the state court is construing for the very first time an act and follows the precise wording of the act as same applies to "anyone". It thus appears evident that

there is no denial of equal protection of the law insofar as your Petitioner is concerned inasmuch as the Act has never been construed before, much less construed differently for others than for the Petitioner.

Petitioner would also have this Court believe that he has been denied due process of the law because of a "capricious", "unreasonable" and "arbitrary" interpretation by the Florida Court of its Marketable Record Title Act. Having so labeled the ruling below, the Petitioner wholly fails to prove his contentions.

Petitioner claims that since the Marketable Record Title Act (Chapter 712, F. S. A.) was not construed as narrowly as Florida's twenty-year curative and limitations statute (Section 95.23, F. S. A.) the broader construction afforded the Marketable Record Title Act automatically results in what Petitioner claims to be a denial to him of due process.

What Petitioner's jurisdictional argument overlooks is that while the Marketable Record Title Act contains elements of a limitation statute, a curative act and a recording statute, it goes beyond all three such statutes in its interpretation. The Florida Court noted these distinctions in its decision and then went on to state:

> "In view of the special nature of this Act and its special purpose, the assertion that its construction and application must be bound by precedents relating to less comprehensive acts does not make good sense and cannot make good law. . . . To accept Petitioner's arguments would be to disembowel the Act through a case dealing with a

factual situation of a nature precisely contemplated and remedied by the Act. This we cannot do." (236 So.2d 114, 119 and 120)

This Court has long recognized limitation statutes to not be a denial of due process of law. *Wheeler* v. *Jackson*, 137 U. S. 245; 11 S.Ct. 76, 34 L.Ed 659.

While the constitutionality of Florida's Marketable Record Title Act has not been determined by any court, Florida has ruled constitutional a recording statute requiring certain contracts to buy land to be recorded *within six months of the enactment of the statute* in order to preserve rights under such contracts. *Mahood* v. *Bessemer Properties* (1944) 154 Fla. 710, 18 So.2d 775.

Florida's Marketable Record Title Act has an effective date of September 1, 1963 (Chapter 63-133, Section 12, *General Laws of Florida*, Vol. 1, Part One). Section 712.09, F. S. A., of this Act provides:

> "If the thirty-year period for filing notice under Section 712.05 shall have expired prior to July 1, 1965, such period shall be extended to July 1, 1965."

This provision of the Act afforded a grace period of upwards of two years in which to perfect otherwise expired claims at the time the Act was enacted. It thus afforded due process to all for it could reasonably be argued that if Florida has already ruled a grace period of six months to be constitutional in its *Mahood* case, *supra*, the two-year grace period of our Act would also be found constitutional; and the Act cannot be held to be so unreasonable, arbitrary and capricious in scope as to be a denial of due process.

So, too, it can be said (as the Florida Court did in its opinion herein, P. App. 13 and 14) that earlier interpretations under a narrower curative act have absolutely no precedents in either the construction to be given a Marketable Record Title Act (which act actually "invalidates" interests instead of simply "curing" formal defects) or in its constitutionality. This Court has long held that in the absence of a clear abuse of one's constitutional rights, it is obligated to follow the construction given state statutes by the state court. *Osborne* v. *State of Florida*, 164 U.S. 650, 17 S.Ct. 214, 41 L.Ed. 586. Since the Florida Court's ruling constituted a case of first impression on its Marketable Record Title Act and since Petitioner has failed to demonstrate the clear existence of a federal question, much less an abuse of his rights thereunder, this Court is obligated to follow the ruling below—even if it feels the state court rendered an erroneous decision on the facts before it. To do otherwise would confer upon the Petitioner the right to an unauthorized second appeal on the merits.

PART II—CONSTITUTIONAL QUESTION NOT TIMELY RAISED

When Petitioner first filed his Complaint, the Respondents plead the Marketable Record Title Act as the basis for dismissal of the Complaint. When the trial court granted the dismissal, the Petitioner became aware that a tribunal was construing this Act as a bar to his recovery even though at this motion to dismiss level the trial court had to accept as true his allegations that a certain deed in the Respondents' chain of title prior to the Act's operative "root of title" was a forgery. At this instance in time Petitioner became aware of how the Marketable Record Title Act was being construed to his set of circumstances.

This construction continued unvaried by the trial court when it dismissed Petitioner's Amended Complaint and when it later dismissed with prejudice the Petitioner's Second Amended Complaint. As noted by the District Court:

> "The Order which dismissed the Second Amended Complaint stated that it failed to state a cause of action on the ground that the plaintiff's alleged claim affirmatively appeared to be barred by the Marketable Title Act." (P. App. 39)

There being no question but that the trial court relied on the Act to bar Petitioner's claim, *the Petitioner should have questioned the constitutionality of the Act in his appeal to the District Court.* Petitioner did not do so. However, Petitioner did argue the applicability of Florida cases construing a curative act and the District Court, in affirming the ruling below, distinguished this curative act (Section 95.23, F. S. A.) from the Marketable Record Title Act and also distinguished Petitioner's cited *Wright* v. *Blocker* (1940) 144 Fla. 428, 198 So. 88 and *Reed* v. *Fain* (Fla. 1961) 145 So.2d 858 decisions from the facts of this case. These very decisions and act are what Petitioner advances to this Court to establish the lack of constitutionality of Florida's Marketable Record Title Act (Chapter 712, F. S. A.).

Faced with such adverse interpretation of what Petitioner felt to be an analogous statute and case law, did Petitioner question the Act's constitutionality when the Supreme Court of Florida granted Certiorari? He did not. Again, the Florida Court not only distinguished the cura-

tive act (Section 95.23, F. S. A.) and the cases which Petitioner cites herein as being persuasive of a denial of due process and of the equal protection of the law, but also the Florida Court followed the reasoning of the District Court that the Marketable Record Title Act under consideration was broader in scope than Petitioner's curative act and indicated that to follow the construction which Petitioner had consistently urged would "disembowel" the Act. Only after such *repeated rejection* of the very same statute and case law which Petitioner urges upon this Court, did Petitioner *raise for the first time* on rehearing the denial of his rights under the Fourteenth Amendment to the Constitution.

To support the timeliness of his raising of the constitutional question, Petitioner relies upon *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107, which holds that if a Federal question arises because of an *unexpected construction of a state statute* by the highest state court, the question is timely raised for purposes of review if presented in a petition for rehearing to that state court.

It is truly incredible that Petitioner can appear before this Court and assert that the Florida Court's ruling was totally unexpected when the very case law and statute on which Petitioner relies for establishing such "surprise ruling" were advanced unsuccessfully by the Petitioner before both the District Court and the Supreme Court.

What Petitioner chooses to overlook is that this Court stated in *State of Missouri* v. *Gehner*, 281 U.S. 313, 50 S.Ct. 326, 327,; 74 L.Ed. 870:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. *Ordinarily, it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more.* (Emphasis supplied)

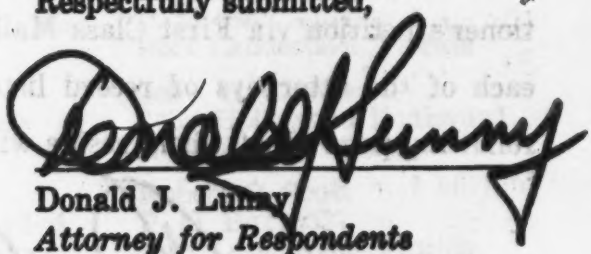
See also *Citizens' National Bank* v. *Durr*, 257 U.S. 99, 42 S.Ct. 15, 66 L.Ed. 149.

In short, the propriety of invoking a federal question for the first time on a petition for rehearing depends on whether the Petitioner should have anticipated the state court's ruling. *Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530. When so viewed, Petitioner's "surprise ruling" evaporates. He *not only anticipated such a ruling but he argued against it at the trial court level, the District Court level and the Florida Supreme Court level.* Since any federal question was clearly not timely raised, this Court should clearly not entertain this Petition.

CONCLUSION

Petitioner has failed to properly invoke the jurisdiction of this Court and, accordingly, his Petition for Certiorari to the Supreme Court of Florida should be summarily denied.

Respectfully submitted,



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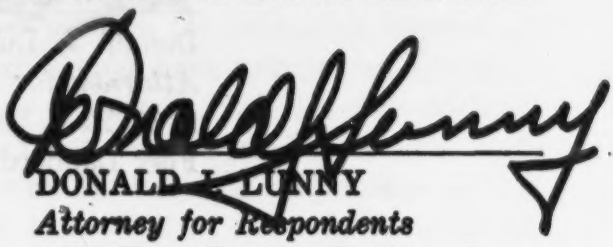
CERTIFICATE OF SERVICE

I hereby certify that pursuant to Paragraph 1 of Rule 33 of the Rules of Supreme Court of the United States, I have this 19th day of October, 1970, mailed copies of the foregoing Brief of Respondents in opposition to Petitioner's petition via First Class Mail, postage prepaid, to each of the attorneys of record listed below and on the following page all of whom reside within 500 miles of me.



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